Concrete Form Walls, Inc. *and* Alabama Carpenters Regional Council Local 127. Cases 10–CA–34483, 10–CA–34584, and 10–RC–15381

April 13, 2006

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 8, 2004, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions as modified and to adopt his recommended Order as modified below.[2]

We agree with the judge that the Respondent violated Section 8(a)(3),(4), and (1) of the Act by discharging employees Jesus (Omar) Garcia Vela, Cesar Moreno, Venancia Morales Serrano, and Severino Morales because they voted in the representation election. We also agree that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by promising employees a wage increase on the eve of the election. Further, we agree that the Respondent's seven ballot challenges should be overruled.[3] Contrary to the judge, however, we find that the Respondent did not violate Section 8(a)(1) when a supervisor told unit employees that the Respondent had searched one of the supervisor's trucks. We also reverse the judge's finding that the Respondent created the impression of surveillance of its employees' union activities. Finally, we agree that, based on the Respondent's hallmark violations of the Act, a remedial bargaining order should issue.[4]

Factual Background

Since 2000, the Respondent has installed concrete walls and footings for residential construction projects. Eric McKenzie is the Respondent's founder and sole shareholder. The Respondent employs three crews of approximately seven workers each, a three-person "footings crew," a driver, and an office clerical. Each seven-person crew is comprised of native Spanish speakers and is supervised by one of three stipulated supervisors—Nicolas Ramirez, Antonio Ramirez, or Ernesto Del Valle.

At all relevant times, the Respondent maintained two payroll systems. The Respondent included group I employees on its formal payroll, paid them by check, and withheld all necessary taxes and deductions. Until the Union's June 2, 2003[5] demand for recognition, the group I payroll included only the three non-Hispanic employees on the footings crew, the driver, and the office clerical. The Respondent's group II payroll consisted of the Hispanic employees and supervisors making up its three seven-person crews (excluding the supervisor). The Respondent paid the group II employees in cash without maintaining proper employment eligibility documentation or withholding taxes.

The Union began its organizing campaign in April 2003. The Union's organizer, Johnny Arguedas, made approximately 35 jobsite visits between April and June. During these visits, Arguedas collected authorization cards from 18 workers. Based on the signed authorization cards, the Union made a demand for recognition on June 2.

On June 3, Arguedas held a meeting with a number of employees. During this meeting, Supervisor Nicolas Ramirez relayed to the gathered employees that, earlier in the day, Respondent's owner, Eric McKenzie, found union literature in Supervisor Antonio Ramirez' personal truck.[6] Nicolas Ramirez said that after discovering the literature, McKenzie removed it and searched the truck for more. Also at this meeting, Supervisor Ernesto Del Valle told the employees that earlier in the day McKenzie told both him and Antonio Ramirez that

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We shall modify the judge's recommended Order to conform to the violations found. We shall also substitute a new notice in conformity with the Order as modified.

[3] Contrary to the judge, Member Schaumber would not rely on community-of-interest grounds to overrule the ballot challenges. Instead, Member Schaumber would find that because the parties' Stipulated Election Agreement does not exclude casual employees from the unit and there is no claim that the agreement is ambiguous, the challenged employees were eligible to vote regardless of whether they are casual employees or have a community of interest with the other employees. See, e.g., *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002).

[4] For the reasons stated below in his partial dissent, Member Schaumber would not issue a remedial bargaining order.

[5] All dates are in 2003 unless otherwise indicated.

[6] Antonio Ramirez used the truck to transport employees and equipment to the various worksites.

McKenzie wanted nothing to do with the Union and that he would give a $1-an-hour raise to any employee who brought in documentation enabling that employee to be placed on the group I payroll.

On June 4, the Union filed a petition to represent a unit of the Respondent's production and maintenance employees, comprised of the 21 employees on the seven-person crews, the three employees on the footings crew, and the driver.[7] Also on June 4, the Respondent placed its three crew supervisors and five other employees on the group I payroll after they presented the Respondent with facially valid employment eligibility documentation. However, these employees did not receive the promised $1-an-hour raise.[8]

On June 10, Arguedas held another meeting with the employees. During this meeting, Del Valle told the employees that McKenzie called him into his office, asked him about the Union, and told him that Antonio Ramirez had said that Del Valle was behind the union organizing campaign. Del Valle further explained that he later spoke with Antonio Ramirez who told him that McKenzie had also called him into the office, but told him that Del Valle said that Antonio Ramirez was behind the organizing campaign.

On June 24, the Board conducted an election at the Respondent's warehouse pursuant to a Stipulated Election Agreement. Of the nine employees on the *Excelsior* list, four voted against the Union and none voted in favor of the Union.[9] The Respondent challenged three employees whose names appeared on the eligibility list—Severino Morales, Cesar Moreno, and Venancia Morales Serrano—on the ground that they were illegal aliens not permitted to vote in the election. The Board agent challenged the ballots of four voters because the names of those individuals, Jesus (Omar) Garcia Vela,[10] Pedro Contreras, Valente Martinez, and Benjamin Romero, did not appear on the eligibility list.

In response to the Regional Director's June 25 request for evidence supporting its ballot challenges, the Respondent conducted internet searches on the four Hispanic group I employees who voted in the election, Jesus (Omar) Garcia Vela, Cesar Moreno, Venancia Morales Serano, and Severino Morales. It did so in an internet credit database called "People Find USA." The searches indicated that the social security numbers provided by the Hispanic voters did not match the names given.[11] The Respondent then discharged these individuals on July 1, 2003.[12] The Respondent continued to employ a cash basis work force at that time and continued to employ Jorge Hernandez, who had not appeared at the polls to vote. The Respondent did not run searches of any of the other employees.

The Judge's Decision

The judge found that the Respondent violated Section 8(a)(1), (3), (4), and (5) of the Act and engaged in objectionable conduct. Further, the judge overruled the Respondent's and the Board agent's ballot challenges and recommended that a remedial bargaining order issue.

The judge found that the Respondent violated Section 8(a)(1) when its supervisor, Nicolas Ramirez, told employees that owner McKenzie searched another supervisor's truck for union literature and confiscated literature found in the truck. The judge also found that the Respondent created the impression of surveillance of the employees' union activities in violation of Section 8(a)(1) when its supervisor told employees of the Respondent's attempt to pit two supervisors against each other in an attempt to learn the roots of the organizing drive. Further, the judge found that the Respondent violated Section 8(a)(1) when Del Valle told employees that McKenzie had told the supervisors that he did not want anything to do with the Union and that he would give a $1-an-hour raise to any employee who brought in documentation to convert from the cash payroll to the formal payroll (group II to group I). The judge further found that

[7] The petitioned-for unit description is: All production and construction employees: excluding office clerical employees, supervisors, and guards as defined in the Act.

[8] When the five nonsupervisors were included on the group I payroll, they provided names that were different from those that they used while they were paid cash. Eduardo Morales Serrano provided the name "Jorge Hernandez"; Mizael del Valle provided the name "Severino Morales"; Cesar Moreno Morales provided the name "Cesar Moreno"; Alberto Morales Serrano provided the name "Venancia Morales Serrano"; and Jesus (Omar) Garcia Vela provided the name "Omar Garcia Vela." The provided names are included on the *Excelsior* list.

[9] The *Excelsior* list included nine employees, all of whom were on the Respondent's formal, group I payroll. Marie Caton, Danny Dickerson, Jerry Matthews, and Jerome Watkins all worked on either the footings crew or in the driver position and were at all times included on the formal payroll. Jorge Hernandez, Severino Morales, Cesar Moreno, Venancia Morales Serrano, and Jesus (Omar) Garcia Vela all worked on the seven-person crews, were all Hispanic, and were all added to the Respondent's formal payroll on June 4.

[10] Jesus (Omar) Garcia Vela was on the eligibility list as Omar Garcia, was on the Respondent's group I payroll, and was terminated on July 1 with the three other employees whom the Respondent challenged. For purposes of analysis, we will consider Jesus (Omar) Garcia Vela with the Respondent's three challenges.

[11] Based on apparent privacy concerns, the search did not indicate to whom the social security numbers were assigned.

[12] The parties stipulated that the Respondent began its only search on the four challenged employees after June 25. While the search dates on many of the documents are unclear, the search material for Severino Morales indicates that it was sent on July 2, the day after the Respondent discharged Severino Morales as an undocumented worker.

the promised wage increase and the supervisor's relating to employees the Respondent's attempt to pit its supervisors against each other amounted to objectionable conduct. The judge sustained Objections 2 and 3.[13]

With respect to the 8(a)(3) and (4) findings, the judge found that the Respondent violated the Act in terminating the four Hispanic group I employees who voted in the election. In so finding, the judge concluded that the Respondent failed to meet its *Wright Line*[14] burden because its "People Find USA" search did not prove that the four discharged employees did not have legal standing to work in the United States because of their purported alien status.

In overruling the seven ballot challenges, the judge rejected the Respondent's argument that undocumented workers are not statutory "employees." Instead, he found that immigration status is irrelevant to voter eligibility and to unit determination issues. He further rejected the Respondent's argument that the three employees who were omitted from the eligibility list were casual employees.

Finally, the judge found that the Respondent's violations precluded a fair second election. He based this on the termination of employees who voted in the election, various postelection statements that employees who voted in the election would not have work with the Respondent, and the other violations of the Act found by him. The judge found that a remedial bargaining order was warranted.

The Respondent's Exceptions

The Respondent's arguments center around three main themes: (1) the seven challenged voters are undocumented workers and neither fall within the statutory definition of "employee" nor share a community of interest with documented workers; (2) the Union did not have a valid card majority; and (3) the evidence does not support the judge's 8(a)(1) findings.

As to the first point, the Respondent relies on *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), to argue that undocumented workers are not statutory employees. Alternatively, the Respondent argues that it has a valid *Wright Line* defense with respect to the terminations because, once it discovered that the four discharged employees were undocumented aliens, it was obligated under Federal law to discontinue their employment. Second, the Respondent argues that the Union did not have a valid card majority (1) because the employees who signed the cards were either undocumented workers or were casual employees not eligible to vote in the election, (2) because the Union made misrepresentations invalidating the authorization cards, and (3) because of supervisory taint. Third, the Respondent argues that the judge improperly weighed the evidence in finding that it violated Section 8(a)(1).

Analysis

The 8(a)(3) and (4) Allegations

We agree with the judge that the Respondent violated Section 8(a)(3), (4) and (1) by terminating the four Hispanic group I employees who voted in the June 24 representation election. Initially, we reject the Respondent's argument that undocumented workers are not statutory employees.[15] To the contrary, the Board has long held that undocumented workers are properly considered "employees" under Section 2(3)'s broad definition. See, e.g., *Duke City Lumber Co.*, 251 NLRB 53 (1980). The Supreme Court has agreed. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

The Respondent's reliance on *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 146 (2002), is misplaced. In *Hoffman*, the Supreme Court reexamined the NLRA's application to undocumented workers in light of the passage of the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a. The Court held that the Board may not award backpay to undocumented workers because such an award would run "counter to the policies underlying IRCA, policies the Board has no authority to enforce or administer." Id. at 149. The Court noted, however, that the Board has other traditional remedies at its disposal to ameliorate unfair labor practices involving undocumented workers. Id. at 152.

The Respondent's argument that *Hoffman* mandates that undocumented workers be excluded from the protection of the Act finds support in neither *Hoffman's* language, the legislative history of the IRCA, nor other post-*Hoffman* decisions. First, *Sure-Tan's* initial holding that undocumented workers are employees under the

[13] Objection 2 alleged that during the critical period prior to the election, the Employer promised to, and subsequently did, place employees on its noncash payroll and give them $1-per-hour pay increases in order to induce them not to support the Union. Objection 3 alleged that the Respondent created an impression of surveillance on June 10, the day Ramirez told the employees of McKenzie's attempt to pit the supervisors against each other. No party excepted to the judge's overruling of Objections 7 and 8, which alleged that the Respondent scheduled employees on election day in a manner that impeded them from voting and refused to release them to vote.

[14] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[15] Accordingly, we reject the Respondent's arguments that Jesus (Omar) Garcia Vela, Cesar Moreno, Venancia Morales Serrano, Severino Morales, Pedro Contreras, Valente Martinez, and Benjamin Moreno were ineligible to vote because they are undocumented workers.

Act remains undisturbed by *Hoffman*. See *Hoffman*, 535 U.S. at 150 fn.4 ("Our first holding in Sure-Tan is not at issue here and does not bear at all on the scope of Board remedies with respect to undocumented workers."). Further, the Court's discussion of other traditional remedies available to the Board other than backpay orders strongly suggests that the Court did not intend to alter course on the general application of the Act to undocumented workers. Second, the House Judiciary Report on the IRCA stated:

> *In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term 'employee' in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act.* As the Supreme Court observed in *Sure-Tan Inc. v. NLRB*, 467 U.S. 883 (1984) application of the NLRA 'helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.' 467 U.S. at 893.

House Judiciary Report on the IRCA, H.R. Rep. No. 682(I), 99th Cong. 2d Sess. 58 (1986), reprinted in USCCAN 1986, pp. 5649, 5562 (emphasis added); *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585, 592 (E.D. Cal. 1991). Third, we have found no case, and the Respondent has directed us to none, in which a court has expanded *Hoffman's* holding to exclude undocumented workers from the statutory definition of "employee" contained in any Federal labor and employment statute. Accordingly, based on longstanding Board law and the Supreme Court's and Congress' explicit approval of that law, undocumented workers remain statutory employees under Section 2(3).[16]

Further, we agree with the judge that the Respondent has failed to show that the discharged employees were undocumented workers and that the Respondent discharged them for that reason. In cases like this one, involving 8(a)(3) and (4) violations that turn on the employer's motivation, we apply the analysis set forth in *Wright Line*, supra. Under that analysis, the General Counsel must initially establish union or protected activity, knowledge, animus and adverse action.[17] Once the General Counsel makes this initial showing, the burden of persuasion then shifts to the Respondent to prove that the same action would have taken place even absent any protected activity. *Central Plumbing Specialties*, 337 NLRB 973, 974 (2002).

As part of his initial showing, the General Counsel may offer proof that the respondent's reasons for the personnel decision were pretextual. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) ("[I]f the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis."); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ("[W]hen the employer presents a legitimate basis for its actions which the fact finder concludes is pretextual . . . the fact finder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive . . . ." (internal quotations omitted)).

Here, the Respondent limits its argument to the fact that it terminated the four employees in compliance with the IRCA because they were undocumented aliens. Despite having facially valid documentation showing that the four employees were lawfully permitted to work,[18] the Respondent challenged them under a suspicion that they were undocumented workers (and based on its view, which we have rejected, that undocumented workers are not eligible to vote in Board-conducted elections). To support its position that the discharged employees were undocumented workers, the Respondent relies on the results of an internet database search showing that the social security numbers did not match the names the Respondent entered into the database. Based on this evidence alone, the Respondent terminated the four Hispanic group I employees who voted in the election.

[16] This analysis assumes arguendo that the persons involved here are undocumented workers. However, as discussed below, we agree with the judge's conclusion that the Respondent failed to prove that they are in fact undocumented workers.

[17] Regarding the *Wright Line* analysis, Member Schaumber notes that the General Counsel's initial burden of showing discriminatory motivation involves proving the employee's union activity, employer knowledge of the union activity, and animus against the employee's protected conduct. The Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as a fourth element, what is otherwise inferred under the *Wright Line* analysis, the necessity for there to be a causal nexus between the union animus (i.e., Sec. 7 animus) and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), Member Schaumber agrees with this addition to the formulation.

[18] The employment verification documents were not made part of the record. However, the Respondent apparently accepted those documents as facially valid when it placed these employees on its formal payroll and only questioned their veracity after the employees voted in the election.

We find that the Respondent failed to prove that the four discharged employees were, in fact, illegal aliens.[19] The Respondent correctly notes that the judge erroneously found that the database search indicated that the social security numbers could not be found, as opposed to the fact that they did not match the names given. However, despite this error, the judge's conclusion that the reports do not prove that the employees are undocumented aliens is sound.[20] The reports are missing critical information—namely, to whom the social security numbers are assigned. As found by the judge, each of the discharged employees' names changed in some significant way after the employees were placed on the Respondent's formal payroll. This easily might explain why the searches came back as not matching the provided names. At best, the Respondent's evidence shows that the employees provided false social security numbers for some reason, a reason not relied on by the Respondent.[21]

Furthermore, even if the Respondent's evidence was sufficient to show that the four discharged employees were undocumented workers, the Respondent's 11th-hour concern with complying with the IRCA is insufficient to excuse the termination of the only four Hispanic group I employees who voted in the election. The Board has found that an employer may violate Section 8(a)(3) even where the employer claims that the discharge was required under another statutory provision. See *New Foodland, Inc.*, 205 NLRB 418 (1973); *Sure-Tan*, 467 U.S. at 896 fn.6 ("If the Board finds, as it did here, that the otherwise legitimate reason asserted by the employer for a discharge is a pretext, then the nature of the pretext is immaterial, even where the pretext involves a reliance on state or local laws."). That an employer can proffer a legitimate reason for a discharge is not a defense where that legitimate reason was "not a moving cause of the discharge." *New Foodland*, 205 NLRB at 420. Of course, absent a finding of unlawful motivation, it would not be an unfair labor practice to report or discharge an undocumented alien employee. See *Sure-Tan*, 467 U.S. at 486. However, an employer cannot use compliance with another statute as a smoke screen for its true purpose of retaliating against employees for exercising their Section 7 rights. See id.; *The Embers of Jacksonville, Inc.*, 157 NLRB 627 (1966) (finding that employer discharged employees in violation of the Act despite the fact that it would have been unlawful under state law to retain the underaged employees).

Even assuming arguendo that the discharged employees were illegal aliens, we find that the Respondent's new-found concern for complying with the IRCA violated Section 8(a)(3), (4), and (1). Here, the evidence shows that the Respondent was aware that these four employees were potentially undocumented aliens well before they voted in the election. In fact, the Respondent's owner admits that he had suspicions and challenged the employees' ballots based on his belief that they were undocumented aliens. The Respondent was content to violate the IRCA and employ workers whom its owner believed were illegal aliens until those workers decided to vote in a Board-conducted election. Not surprisingly, the Respondent limited its concern with its IRCA obligations to the four Hispanic group I employees who voted in the election. The Respondent made no attempt to discover whether its other employees were legally permitted to work. In fact, the Respondent purposefully avoided running a similar check on Jorge Hernandez, who provided work eligibility documentation at the same time as the four discharged employees—the only difference being that Mr. Hernandez did not vote in the election.

The postelection statements of one of its supervisors make the Respondent's intent even clearer. On several occasions, Supervisor Antonio Ramirez told employees, including Benjamin Romero, who voted under challenge, that those employees who voted in the election would not have work with the Respondent. Accordingly, we find that the Respondent's selective compliance with the

[19] For purposes of our analysis, we assume arguendo that the Respondent reasonably believed that the discharged employees were illegal aliens. However, for the reasons set forth below, we find that this was not the real reason for their discharge, but merely a pretext for unlawful discrimination.

[20] A Social Security Administration "no-match" letter cannot by itself put an employer on notice that an employee is ineligible to work. Immigration Employees Compliance Handbook §6:53 (West 2004). Instead, when the Social Security Administration notifies an employer that a provided number does not match an employee's name, an employer is required to reverify an employee's eligibility if its attempts to resolve the discrepancy fail. In light of the fact that official notifications from the Social Security Administration are an insufficient basis to summarily conclude that an employee is ineligible to work, we cannot find that an employer may reasonably rely on a private internet database search to conclude that an employee is ineligible to work without any apparent attempts to reverify employment status.

[21] Even this conclusion is beyond the evidence. Without providing the names to which the social security numbers are assigned, the Respondent's evidence does not even show that the employees gave incorrect social security numbers, as they may match some iteration of their names. There is no indication that the Respondent ran multiple searches with different iterations of the employees' names or made any other effort to ensure the accuracy of the results. Further, there is no evidence in the record indicating how sensitive the database is to small differences between the inputted names and the names located in its database. Finally, at no time did the Respondent request an explanation of the discrepancies from the employees. Without such evidence, we are unable to conclude that the reports even prove what they purport to prove (that the names do not match the numbers), let alone that each employee is an illegal alien.

IRCA was a pretext for unlawful discrimination and cannot stand as a valid defense.

Although we conclude that the Respondent's immigration-based defense to its ballot challenges and discriminatory conduct lacks merit, we do not pass on whether the Respondent may argue in compliance proceedings that its backpay liability can be reduced, under *Hoffman Plastics*, 535 U.S. 137, based on the discriminatees' immigration status. On the one hand, the Respondent raised the immigration-status issue, litigated it fully in the context of both its ballot challenges and *Wright Line* defense to the 8(a)(3) allegations, and we have resolved those issues here. Thus, it could be argued that the Respondent should be precluded from raising the immigration status of the discriminatees anew in compliance proceedings. On the other hand, if the Respondent has more current evidence bearing on the status of the discriminatees that was unavailable at the time the employees were discharged; it is arguable that the Respondent should be permitted to introduce such additional evidence at the compliance stage. We leave the resolution of this issue to later proceedings, if necessary.

The 8(a)(1) Allegations

The judge found, and we agree, that the Respondent violated Section 8(a)(1) and engaged in objectionable conduct by promising a $1-an-hour raise to those group II employees who provided employment verification documentation sufficient to place them on the formal group I payroll. As set forth in detail in the judge's decision, the credited testimony shows that Supervisor Del Valle related to employees the promised $1-an-hour raise on June 3, the day after the Union requested recognition. Despite the Respondent's intimations to the contrary, there is no evidence, other than the Respondent's owner's self-serving and discredited testimony, supporting its argument that it had begun in March and April, on the advice of its accountant, to convert employees from the group II to the group I payroll. In light of the fact that no employee was converted until June 4, 2 days after the promised $1-an-hour raise, the judge correctly found that the Respondent took no action to convert its group II employees to group I employees until after the Union demanded recognition. It is well settled that employer promises or grants of benefits, such as wage increases, are violative of Section 8(a)(1) of the Act when they are timed to affect the election and are not consistent with the employer's past practice. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). Given its timing, just 24 hours after the Union demanded recognition, the Respondent's promise to group II employees of a wage increase if they converted to the group I payroll would reasonably have been understood by employees to be solely for the purpose of dissuading them from supporting the Union.

While we agree that the Respondent violated Section 8(a)(1) by promising a wage increase in response to the Union's demand for recognition, we disagree with the judge's other 8(a)(1) findings.

First, the judge found that the Respondent violated Section 8(a)(1) when Supervisor Nicolas Ramirez told a group of employees that he witnessed Respondent's owner, McKenzie, search Supervisor Antonio Ramirez' truck,[22] "grab" and confiscate union literature, and continue searching for more literature in the truck. Contrary to the judge, we do not find this conduct to be unlawful.[23] It is axiomatic that supervisors are excluded from the protection of the Act. In fact, an employer may lawfully discharge a supervisor for engaging in prounion conduct even though such a discharge could cause employees to reconsider or abandon their own protected concerted activity. *Parker-Robb Chevrolet*, 262 NLRB 402, 404 (1982), review denied sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). If the Respondent could have summarily discharged Supervisor Ramirez for his possession of prounion literature without violating the Act, it certainly could simply search his truck, used to transport employees and equipment, without violating the Act. A supervisor's informing employees of this legal action taken against another supervisor for his or her prounion conduct does not violate Section 8(a)(1) even if the Respondent intended that the relaying of such information would quell the employees' organizing drive. See *Parker-Robb Chevrolet*, 262 NLRB at 404 ("No matter what the em-

[22] Antonio Ramirez used his personal truck to transport both the Respondent's equipment and employees to the jobsites. All witnesses testified that McKenzie occasionally inspected the trucks to insure that expensive equipment was present.

[23] Contrary to her colleagues, Member Liebman would affirm the violation found by the judge. Informing employees that a truck in which they were known to ride had been searched for union literature, and that such material had been confiscated, would reasonably cause employees to assume that *their* union activity was under surveillance. That the truck belonged to a supervisor is immaterial. The analogy is not with an employer's lawful discharge of a supervisor for engaging in union activity, but rather with the later *use* of such a discharge to threaten employees. Under *Parker-Robb Chevrolet*, supra, cited by the majority, such a threat is unlawful, even if the discharge was not. See id. at 404 fn. 19. Here, the underlying search was clearly directed at employees, not the supervisor, and it would have been perceived that way, especially in the context of the Respondent's other coercive conduct, i.e., promising a wage increase, which McKenzie also relied upon supervisors to communicate. Precisely because the search for union literature was recounted by a friendly supervisor with whom employees shared a close relationship and common language, the resultant chill on their protected activities was likely to have greater effect.

ployer's subjective hope or expectation, that circumstance cannot change the character of its otherwise lawful conduct.").

Member Liebman notes that an employer can violate Section 8(a)(1) if it uses lawful action taken against a supervisor to coerce or threaten employees. While we do not quarrel with that proposition, it does not apply to this case. In *Snyder Bros. Sun-Ray Drug*, 208 NLRB 628 (1974), petition for review denied 511 F.2d 448 (D.C. Cir. 1975), the Board found that an employer violated Section 8(a)(1) where its store manager and its assistant store manager told a number of employees that a supervisor had been fired for his union activity. The Board found that it was clear that the managers' "remarks were calculated to create the impression among the employees that they would suffer the same fate as [the supervisor] if they engaged in union activities . . . ." Id. Here, there is no evidence that McKenzie, the Respondent's owner, told anyone that he had searched the supervisor's truck in an effort to threaten employees or attempted to use his lawful search in any manner whatsoever. The only way that the employees were informed of McKenzie's search was through a friendly supervisor, Nicolas Ramirez, who happened to witness it (and, contrary to Member Liebman's suggestion that McKenzie "relied" on Ramirez to communicate the search to employees, there is no evidence that McKenzie told Ramirez to do so or that he knew or believed Ramirez would do so). Under the circumstances, employees would not reasonably perceive a threat to themselves. Nor, contrary to Member Liebman's view, would they reasonably conclude that their union activities were under surveillance. Rather, they would reasonably conclude that McKenzie was keeping an eye on his supervisors' union activities. Finally, Member Liebman says that it is "immaterial" that the truck belonged to a supervisor. Similarly, she says that the search "was clearly directed at employees, not the supervisor." We disagree on both counts. The issue is whether employees would reasonably view the search as being directed at them. The fact that the truck belonged to a supervisor is clearly "material" to that issue.

Second, the judge found that the Respondent violated Section 8(a)(1) and engaged in objectionable conduct when Supervisor del Valle told a group of employees that McKenzie had called Del Valle into his office and told him that Supervisor Antonio Ramirez told McKenzie that Del Valle was behind the union campaign. Del Valle also told the employees that he spoke with Antonio Ramirez who told Del Valle that McKenzie called him into the office and told him that Del Valle told McKenzie that Ramirez was behind the union campaign. The judge found that these statements reasonably tended to create an impression among the employees that their own identities and activities in support of the Union were under surveillance.

Again, we find that this conduct directed at supervisors does not constitute a violation of Section 8(a)(1) of the Act. In determining whether an employer has created an impression of surveillance, the Board examines "whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance." *United Charter Service,* 306 NLRB 150 (1992). Here, there is no evidence that the Respondent questioned its supervisors about the employees' protected activity and that this questioning was relayed to the employees. Instead, all that was relayed was a confusing attempt to pit two supervisors against each other. Further, as noted above, an employer does not violate Section 8(a)(1) when it informs its employees that lawful action has been taken against a supervisor for engaging in unprotected union activity. Accordingly, informing the employees that the Respondent sought to learn the origins of the organizing campaign by interrogating its supervisors does not violate Section 8(a)(1). We find that Del Valle's statements alone fail to establish that employees would reasonably think that their protected activities were under surveillance.

Bargaining Order

The Board will issue a remedial bargaining order in two categories of cases. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–614 (1969); *Hialeah Hospital*, 343 No. 52, slip op. at 5 (2004). So-called category I cases are "exceptional cases . . . marked by unfair labor practices so 'outrageous' and 'pervasive' that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible." *Hialeah Hospital*, supra (quoting *Gissel*, supra). Category II cases involve "'less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede election processes.'" Id. (quoting *Gissel*, supra at 614). "In the latter category of cases, the 'possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed [by authorization] cards would, on balance, be better protected by a bargaining order.'" Id. (quoting *Gissel*, supra). In determining the appropriateness of a bargaining order, the Board will consider the identity of the person who committed the unlawful conduct, the person's rank within the company, and the number of employees directly affected by the violation. *Michael's Painting, Inc.*, 337 NLRB 860, 861, enfd. 85 Fed. Appx. 614 (9th Cir. 2004). However, a *Gissel* bargaining order is an extraordinary remedy, and

the preferred route is to provide traditional remedies and to hold an election "once the atmosphere has been cleansed by those remedies." *Hialeah Hospital*, supra.

Based on the Respondent's unfair labor practices, the judge found that this was a category I case and recommended that the Board issue a bargaining order. Based on our careful examination of the record, we agree that this is at least a *Gissel* category II case.[24] Accordingly, we have evaluated the extensiveness of the Respondent's unfair labor practices to determine whether the Board's traditional remedies are sufficient to negate the coercive impact of the violations on the employees' right to freely choose whether to be represented. See *Michael's Painting, Inc.*, 337 NLRB at 861. We find that they are not.

The Respondent's hallmark violations of the Act, directed by its president and sole shareholder, struck at the very heart of the employees' Section 7 rights. The Respondent targeted the four Hispanic group I employees who voted in the election, looked behind their employment verification documents, and terminated them based on the barest of evidence that they might be undocumented aliens. The fifth Hispanic group I employee who did not vote in the election fared much better and was not similarly investigated. As found by the judge, Supervisor Antonio Ramirez told the employees that those who voted in the election would not have work with the Respondent.[25] In addition to the four unlawful terminations, the Respondent also violated Section 8(a)(1) by promising a wage increase. The Respondent's apparent willingness to threaten employees with termination for voting in a Board-conducted election and to follow through on those threats casts serious doubts on whether a fair second election can be held. See *Ron Junkert*, 308 NLRB 1135, 1135–1136 (1992) (bargaining order based in part on termination of the leading union adherent in a unit of six employees "by the highest level of ownership and management"); *Michael's Painting, Inc.*, 337 NLRB at 861 (bargaining order based in part on the unlawful discharge of five employees in a 34-person unit and a demand that employees provide documentation of their immigration status before they could be paid); *Transportation Repair & Service*, 328 NLRB 107, 114 (1999) (citing postelection discharge of a union supporter in a 25-person unit as making it less likely that a fair rerun election could be held).[26]

The coercive impact of the Respondent's unfair labor practices is unmistakable. First, the size of the unit was small, consisting of 25 employees, only 17 of whom were current or former Hispanic group II employees. In a unit of this size, the termination of four employees who voted in the election would have a deep and lasting impact on each employee. See id. Second, the Respondent wasted no time before beginning its campaign of unfair labor practices. Within 24 hours of the Union's demand for recognition, the Respondent unlawfully promised a $1-an-hour wage increase to those group II employees who provided employment verification documentation sufficient to move them to the formal group I payroll. The same employees, who took the Respondent's offer, were shortly thereafter terminated simply because they exercised their Section 7 rights to vote in a Board-conducted election against the Respondent's wishes.

Without minimizing the routine effectiveness of the Board's traditional reinstatement and notice-posting remedies, we find that in this case such remedies cannot erase the long-term effect of the Respondent's unlawful actions. The Respondent's work force is comprised almost entirely of Spanish-speaking employees with questionable ability to work in the United States legally.[27] Accordingly, the other Hispanic employees stand in virtually the identical situation as the four discharged employees. This is unlike the typical situation where an employer finds some employee-specific rule violation or performance problem to justify a termination. The Respondent's message from the first election was received clearly by the unit employees—vote in the election and risk having your employment documentation questioned and being terminated as an undocumented alien.[28] Further, the Respondent does not challenge the fact that the coercive effects of the alleged unfair labor practices warrant a remedial bargaining order. Instead, the Respondent argues (1) that it did not violate the Act and (2) that there is not a valid card majority upon which to base a

[24] Because we find that a remedial bargaining order should issue under a category II analysis, we find it unnecessary to pass on the judge's conclusion that a bargaining order would be appropriate under a category I analysis.

[25] While these threats were not alleged as unfair labor practices, the judge relied, in part, on these statements in determining that the discharges violated Sec. 8(a)(3).

[26] In finding it unlikely that traditional remedies would enable a fair rerun election, the judge found that the Respondent's "discriminatory" postelection discharge of employee Benjamin Romero demonstrated that the Respondent's unfair labor practices were "continuing." These findings are improper, however, because the lawfulness of Romero's discharge was never put at issue. In fact, the judge denied the General Counsel's motion to amend the complaint to allege an 8(a)(3) violation for Romero's discharge. Thus, in issuing a remedial bargaining order, we place no reliance on the judge's findings concerning that discharge.

[27] Apparently the only unit employees who are not native Spanish speakers were the four group I employees who voted without challenge against the Union.

[28] This threat is even more potent now that the Respondent has moved all of its employees to its formal payroll.

bargaining order. Both of these contentions are without merit.[29] See *United Scrap Metal, Inc.*, 344 NLRB No. 55, slip op. at 2 (2005) (rejecting respondent's argument that Gissel bargaining order should not issue for want of a valid card majority). The Respondent's craven attempt to keep approximately 85 percent of its work force from the polls has so poisoned the well that it would be surprising if any of the Hispanic employees voted in a second election. Accordingly, we agree with the judge that the employees' Section 7 rights are better protected through the old card majority than through a new election.

We recognize that the Board has declined to issue a remedial bargaining order in a number of recent cases. See, e.g., *Mc Allister Towing & Transportation Co., Inc.*, 341 NLRB 394, 399–400 (2004) (finding a bargaining order not necessary where there the employer committed no hallmark violations); *High Point Construction Group, LLC*, 342 NLRB No. 36, slip op. at 2–3 (2004), enfd. sub nom. *Mid-Atlantic Regional Council of Carpenters v. NLRB*, 135 Fed. Appx. 598 (4th Cir. 2005) (employer committed a single hallmark violation in threatening to close the plant); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 979 (2004) (employer committed a single hallmark violation in unlawfully awarding a pay raise). However, unlike the Board's more recent cases, the Respondent committed several hallmark violations of the Act, and its unlawful discharges affected approximately 16 percent of the overall unit and nearly 20 percent of the Hispanic employees. The Board's decision in *Desert Aggregates*, 340 NLRB 289, 291–292 (2003), is distinguishable. There, the Board declined to issue a bargaining order despite the fact that the employer discriminatorily laid off nearly 20 percent of the unit. The Board found that the impact of these hallmark violations was mitigated by the employer's colorable explanation that the layoffs were necessitated by a decline in business and the employer's attempt to recall the two employees as soon as business improved. Here, the Respondent's pretextual compliance with the IRCA cannot afford similar cover. Instead of keeping the employees on the payroll while it attempted to resolve the discovered potential discrepancies, the Respondent fired first and asked questions later—continuing to run searches on at least one employee the day after his termination and later requesting that the Union provide evidence that the four discharged employees were, in fact, documented workers.

Our dissenting colleague would not issue a bargaining order in this case. We acknowledge that the Board has denied bargaining orders in cases where an employer has, in addition to other violations of the Act, discriminatorily discharged employees. See, e.g., *Hialeah Hospital*, supra; *Abramson, LLC*, 345 NLRB No. 8 (2005). However, none of the cases relied on by our dissenting colleague involve an employer who discharged employees because they exercised their core Section 7 right to vote in a Board-conducted election. Our dissenting colleague notes that a Section 7 right is abrogated in every case in which an employee is discriminatorily discharged prior to an election. That is true, but the instant case involves more than that. In a typical case, an employee is discharged for certain union activity before the election. In the instant case, the employees were discharged after the election because they chose to cast ballots in the election. Surely the act of voting lies at the core of the Section 7 right—a right that employees in a subsequent rerun election would be understandably wary to exercise. We believe that there is a marked difference between the type of interference with the Section 7 right caused by a preelection discharge and that caused by a discharge resulting directly from an employee's exercise of that right. The former interferes with the employee's right to make a free electoral choice, while the latter represents a full frontal assault on the right to vote at all. We have found no case, and none is cited, where a *Gissel* order was denied in circumstances where an employer discharged an employee simply because he cast a ballot in an election. And, while it may be possible that the Board's traditional remedies, combined with the ordered reading of the Board's order, might cleanse the atmosphere sufficiently to conduct a second election, such a possibility is unquestionably slight given the Respondent's unprecedented violations and the long-lasting effect that those violations will have on its remaining workforce which is particularly vulnerable to immigration related threats or actions. Although the Respondent has not shown that the discriminatees here were undocumented workers, there may be others in the work force whose status is questionable. It is unlikely that these vulnerable employees will breathe a sigh of relief simply because their employer has recited words of assurance.

We do not, as our dissenting colleague argues, undermine the significance and force of our special remedies. We simply acknowledge that they alone cannot sufficiently remedy unfair labor practices in every case. And,

[29] The Respondent's argument that the authorization cards were invalidated by statements made by Arguedas is without merit. The judge's finding that Arguedas made no misrepresentations that would invalidate the cards is supported by the fact that Arguedas credibly testified that he routinely read the entire card to the employee before the employee signed it and explained that the cards would be used to seek voluntary recognition but that employers often refuse to grant such recognition. Moreover, there is no evidence that any of the supervisors engaged in any conduct that would have tainted the cards. See *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004).

while we agree that "dollars and cents words" may carry more weight, we doubt that they would in this case. We are concerned that the coercion visited on these employees will not be so easily erased.

Given the nature of the Respondent's unlawful conduct directed against employees who are naturally vulnerable to threats related to immigration status, the associated threats that those who voted in the election would not have work, and the unlawful promise of a wage increase, we find there is scant possibility that the Board's traditional remedies alone might cleanse the atmosphere sufficiently to provide the employees with a fair second election. It is hard to imagine more pernicious conduct designed to erode support for the Union and to keep employees away from the polls. In fact, the Respondent's threats to the Hispanic employees that those who voted would not have work with the Respondent and the eventual discharge of those who voted shadowed the central promise of the Section 7 right—the right to choose whether to be represented or not. Accordingly, a bargaining order based on the 18 signed authorization cards in the 25-employee unit is necessary. The effect of the investigation and eventual termination of the Hispanic group I employees who voted, coupled with the Employer's unlawful promised wage increase, cannot be remedied by the Board's traditional remedies alone.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Concrete Form Walls, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1 (a) and (b) and reletter the remaining paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Case 10–RC–15381 be severed from Cases 10–CA–34483 and 10–CA–34584 and remanded to the Regional Director for Region 10 for action consistent with the Direction below.

DIRECTION

It Is Directed that the Regional Director for Region 10 shall, within 10 days from the date of this decision, open and count the ballots of Severino Morales, Cesar Moreno, Venancia Morales Serrano, Jesus (Omar) Garcia, Pedro Contreras, Valente Martinez, and Benjamin Moreno and that he prepare and serve on the parties a revised tally.

If the final revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots case, the Regional Director shall issue a certification of representative. This certification of representative shall be in addition to the bargaining order.[30] *General Fabrications Corp.*, 328 NLRB 1114, 1116 fn.17 (1999), enfd. 222 F.3d 218 (6th Cir. 2000); *Eddyleon Chocolate Co.*, 301 NLRB 887, 892 (1991). If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, vacate the proceedings in Case 10–RC–15381, and the bargaining order alone shall take effect. *Moe Warehouse & Accessory*, 275 NLRB 1132 fn.1 (1985).

Dated, Washington, D.C. April 13, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I. A Gissel Bargaining Order Is Unwarranted in This Case

I disagree with my colleagues' conclusion that a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is warranted in this case.[1] A *Gissel*

[30] Chairman Battista questions whether a *Gissel* bargaining order is appropriate if the Union has won the election. A certification based upon a victory in a secret ballot election leads to a bargaining obligation that will have an insulated period of one year. A bargaining order, based upon authorization cards, will lead to a bargaining obligation with an insulated period of only a reasonable period of time. In addition, Chairman Battista questions whether it can be said that a fair election is unlikely where the union has won the election. Notwithstanding these doubts, the Chairman agrees to enter the *Gissel* bargaining order now, i.e. even though there is a possibility of a certification. In doing so, he notes that current Board precedent supports it. *General Fabrications Corp.*, 328 NLRB at 1116 fn.17; *Debbie Reynolds Hotel*, 332 NLRB 466, 468, 477 (2000). There are not three votes to reverse that precedent.

[1] In concluding that a *Gissel* bargaining order is warranted, my colleagues improperly rely in part on their assertion that the Respondent "does not challenge the fact that the coercive effects of the alleged unfair labor practices warrant a remedial bargaining order." Regardless of whether the Respondent urged this specific argument, it clearly excepted to the judge's recommended *Gissel* order. More importantly, "the Board has broad discretionary authority under Sec. 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act," and "remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions." *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996) (internal quotations omitted). Thus, even if the Respondent had failed altogether to

bargaining order is an extraordinary remedy. The preferred route is to provide traditional remedies for the unfair labor practices and to hold an election once the atmosphere has been cleansed by those remedies. *Hialeah Hospital*, 343 NLRB No. 52, slip op. at 5 (2004); *Aqua Cool*, 332 NLRB 95, 97 (2000). In addition, we have adopted the judge's recommended special remedy of requiring the notice to be read aloud to employees by a management official or a Board agent in the official's presence. I would find this remedy, together with the Board's traditional remedies, sufficient in this case.

The Respondent discharged four employees out of a 25-employee bargaining unit and committed one additional unfair labor practice by promising, but not granting, a wage increase the day after the Union demanded recognition.[2] Without minimizing the seriousness of the Respondent's conduct, it must be pointed out that the Board has declined to impose *Gissel* bargaining orders in cases involving, like this one, discriminatory separation from employment—either discharge or refusal to return from layoff—plus numerous other unfair labor practices. For instance, in *Hialeah Hospital*, supra, the Board declined to impose a *Gissel* bargaining order against an employer that committed a retaliatory discharge and many 8(a)(1) violations, including threats, surveillance, promise of benefits, and removal of benefits. In *Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117 (2004), the Board refused to impose a *Gissel* bargaining order against an employer that, among other things, granted a unit-wide wage increase, discharged a leading union activist the day before the election, made threats of plant closure, and engaged in surveillance. And in *Abramson, LLC*, 345 NLRB No. 8 (2005), no *Gissel* bargaining order issued against an employer that discriminatorily refused to return a principal union supporter from layoff and committed multiple "hallmark" violations by threatening employees with job loss, loss of benefits, and plant closure. The Respondent's misconduct here, while brazen, was not less capable of being remedied without the imposition of a *Gissel* bargaining order than the misconduct of the employers in these three cases.

Contrary to the majority, that the Respondent discharged employees for voting in a Board election does not, in my view, adequately distinguish this case from those just cited. Although I agree that an employee's right to vote in a Board election is a core Section 7 right, that right is abrogated in every case in which employees are discriminatorily discharged prior to a Board election–such as, for example, in *Jewish Home for the Elderly*, supra, by the discharge of a leading union activist the day before the election. Since the Board declined to issue a bargaining order in that case, I find an insufficient basis exists to do so here.

The majority declares that there is a "marked difference" between this case and cases like *Jewish Home*. I agree that the cases are not identical. In one, the discriminatory discharge happens prior to the election; in the other, it happened because employees voted in the election. But I disagree with the majority that this difference makes a difference, such that this case warrants an extraordinary *Gissel* remedy and *Jewish Home* did not. In both cases, the voting right was abrogated by the unlawful discharges, at least for the time being. The only material difference I see is that in *Jewish Home*, the Board's remedy did not perpetuate the loss of employees' voting right, whereas here, the *Gissel* remedy will.

It must be kept in mind that the interference with the Section 7 voting right that troubles both my colleagues and myself is not left unremedied absent a *Gissel* bargaining order. Discharged employees are reinstated with backpay. The employer posts (and in this case, also reads) a notice.[3] The atmosphere thus cleansed, a second election is held. By contrast, when the Board imposes a *Gissel* remedy, employees are deprived for a time of the very Section 7 voting right the majority seeks to vindicate. Sometimes that extraordinary step must be taken.

except to the *Gissel* order, that would not furnish a basis for adopting the order.

[2] The Respondent's unfulfilled promise of a wage increase makes this case distinguishable from those in which an employer has unlawfully *granted* benefits, an unfair labor practice that the Board has found "'difficult to remedy by traditional means . . . because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees.'" *Cardinal Home Products*, 338 NLRB 1004, 1011 (2003) (quoting *Gerig's Dump Trucking*, 320 NLRB 1017, 1018 (1996), enfd. 137 F.3d 936 (7th Cir. 1998)).

[3] The majority undermines the significance and force of the Board's special notice-reading remedy by dismissively referring to it as a mere "recit[ation of] words of assurance." I disagree with this characterization. As discussed more fully below, the Respondent will be announcing before the gathered employees that it violated Federal labor law by, among other things, discharging employees for voting in a Board-conducted election, and that it is offering those employees full and immediate reinstatement, with backpay, and with *interest* on that backpay. This announcement gives teeth to other notice provisions, including in particular the promise, which the Respondent must also announce, that in future it will not discharge its employees for supporting the Union or for voting in another Board-conducted election. These are not mere "words of assurance," as my colleagues put it, because employees will understand that complying with them is in the Respondent's financial self-interest. No matter how justifiably distrustful the assembled employees might be, they will understand that to disobey the Board's Order would cost the Respondent backpay plus interest, making obedience the cheaper alternative. They might not believe mere words, but dollars-and-cents words carry the ring of truth.

But because it limits employee free choice, the *Gissel* remedy must be reserved for truly extraordinary cases.

I recognize, as my colleagues point out, that the Respondent's work force consists almost entirely of Spanish-speaking employees whose ability to work legally in the United States is questionable, and therefore the Respondent's other Hispanic employees stand in virtually the identical situation as the four discharged employees. However, I disagree with the conclusion my colleagues draw from these circumstances—namely, that remedies short of a *Gissel* bargaining order would fail to erase the effect of the Respondent's unlawful actions. The Respondent's employees will hear a management official—owner McKenzie, most likely—or a Board agent in the official's presence, read the Board's notice. It will be read in Spanish as well as English. It will be posted in both languages for 60 days. Thus, employees will both hear and read their employer's promise (a) not to discharge employees "for supporting the Union or for voting in an election conducted by the National Labor Relations Board," (b) to offer the four discharged employees immediate reinstatement, (c) to make those employees whole for loss of earnings and benefits, and (d) to purge its files of any reference to their unlawful discharge. Situated, as they are, virtually identically with their four discharged coworkers, the Respondent's employees would understand that they would receive the same protection from this Board as did their coworkers should the Respondent decide to break its promises and repeat its unlawful conduct. In sum, a *Gissel* bargaining order trumping the employees' Section 7 right to freely choose a bargaining representative in a secret-ballot election is not warranted here. The Board's traditional remedies, together with the special notice-reading remedy, will suffice to cleanse the atmosphere for another election.[4]

[4] I would not include among those remedies, however, a broad cease-and-desist order, which the judge recommended and my colleagues adopt. In light of the Supreme Court's admonitions to the Board concerning the use of broad cease-and-desist orders, see *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941), the specificity requirements of Fed.R.Civ.P. 65(d) that render such orders exceedingly difficult to enforce, and the fact that we are ordering notice reading, I believe that traditional remedies, including a "narrow" cease-and-desist order restraining "any like or related" violations of Sec. 8(a)(1), (3), and (4), are appropriate and sufficient to address the violations in the instant case. I, therefore, dissent from the issuance of a broad order restraining "any" violations of the Act. See *Postal Service*, 345 NLRB No. 25, slip op. at 4–7 (2005) (Member Schaumber, dissenting in part).

II. The Majority's Suggestion that the Respondent May Be Precluded from Litigating Immigration Status at Compliance Is Unsound

Finally, I disagree with the majority's suggestion that it may be proper to preclude the Respondent from litigating the discriminatees' immigration status at a future compliance proceeding. It is well-settled Board law that only those issues litigated *and decided* in an unfair labor practice proceeding are precluded from relitigation at an ensuing backpay proceeding. See, e.g., *Paolicelli*, 335 NLRB 881, 883 (2001); *Aroostook County Regional Opthalmology Center*, 332 NLRB 1616, 1617 (2001); *Arctic Framing, Inc.*, 313 NLRB 798, 799 (1994). Here, the only immigration-related issue the Board is deciding is whether the results of the Respondent's internet searches in a credit database called "People Find USA" were sufficient to sustain its *Wright Line* defense, not whether the discriminatees are, in fact, undocumented aliens.

The majority suggests that preclusion may apply because the Respondent raised and litigated the discriminatees' immigration status in the context of both its ballot challenges and its *Wright Line* defense. But preclusion cannot apply because we have not *decided* the status issue in either of those contexts. We do not decide it in rejecting the Respondent's challenges to the employees' ballots because, notwithstanding the Respondent's argument to the contrary, undocumented aliens are employees for purposes of the Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984). Thus, in overruling the Respondent's challenges, we do not pass on the Respondent's irrelevant claim that the challenged employees are undocumented aliens because even if they are, that would have no effect on their eligibility to vote.

We also do not decide the status issue in rejecting the Respondent's *Wright Line* rebuttal defense. Under *Wright Line*, the Respondent's burden was to show that it would have discharged the alleged discriminatees even in the absence of their protected activity. In making that showing, the Respondent was, of course, limited to the information it possessed about the discriminatees at the time of their discharge. That information consisted of the results of its "People Find USA" internet searches. The Respondent could not have gone beyond those results to support its *Wright Line* defense because, at the time the Respondent discharged the employees, the internet searches were the *only* evidence it had of the discriminatees' alleged undocumented alien status. Thus, in finding the Respondent's *Wright Line* defense pretextual, we decide only that those search results failed to establish that the discharged employees are undocumented aliens—not that the discharged employees are not, in fact, undocumented aliens ineligible for rein-

statement under the Immigration Reform and Control Act of 1986 (IRCA) and precluded from being awarded backpay by the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). Because that latter issue remains undecided, the Respondent is entitled to litigate it at compliance based on any and all admisible immigration-related evidence it has gathered by the time of or may elicit at that supplemental proceeding.

Dated, Washington, D.C. April 13, 2006

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promise raises or other benefits in order to encourage you to abandon support for the Union.

WE WILL NOT discharge employees for supporting the Union or for voting in an election conducted by the National Labor Relations Board.

WE WILL NOT refuse to recognize and bargain with Alabama Carpenters Regional Council Local 127 as the exclusive collective-bargaining representative for the following group of our employees:

All production and construction employees; excluding office clerical employees, supervisors and guards as defined by the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL recognize and bargain exclusively in good faith with the Alabama Carpenters Regional Council Local 127 as the exclusive representative of the employees in the unit described above and, if an understanding is reached, embody that understanding in a signed contract.

WE WILL offer Jesus (Omar) Garcia Vela, Cesar Moreno, Severino Morales, and Venancia Morales Serrano full and immediate reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions without prejudice to seniority or other rights or privileges.

WE WILL make whole Jesus (Omar) Garcia Vela, Cesar Moreno, Severino Morales, and Venancia Morales Serrano, for any loss of earnings or benefits they may have sustained as a result of our unlawful discharge of them, with interest.

WE WILL remove from our files all references to the unlawful discharges of Jesus (Omar) Garcia Vela, Cesar Moreno, Severino Morales, and Venancia Morales Serrano, and we will inform them in writing that we have done so and that the discharges will not be used against them in any way.

CONCRETE FORM WALLS, INC.

John Doyle, Esq., for the General Counsel.
Braxton Schell, Jr., Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard by me on April 13 and 14, 2004, in Birmingham, Alabama. The charge in Case 10–CA–34483 was filed by the Alabama Carpenters Regional Council Local 127 (the Union) on July 3, 2003.[1] The amended charge in Case 10–CA–34584 was filed by the Union on October 14, 2003. The Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing were issued by the Regional Director of Region 10 of the National Labor Relations Board (the Board) on February 18, 2004. The consolidated complaint alleges that Concrete Form Walls, Inc. (Concrete Form Walls, CFW, the Company, or the Respondent) violated Sections 8(a)(1), (3), (4) and (5) of the National Labor Relations Act (the Act). The Respondent has by its answer denied the commission of any violations of the Act.

On the entire record including my observation of the demeanor of the witnesses and after considering the trial memorandums of the parties, I make the following:

[1] All dates are in 2003, unless otherwise specified.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits and I find that at all times material herein for the prior 12-month period, the Respondent, with an office and place of business in Birmingham, Alabama, has been engaged in erecting concrete walls in the building and construction industry, that Respondent in conducting its aforesaid business operations derived gross revenues in excess of $50, 000, in performing services for various Alabama enterprises, which enterprises in turn, on an annual basis, purchased and received goods valued in excess of $50,000 in interstate commerce, directly from suppliers located outside the State of Alabama and/or shipped goods to or performed services valued in excess of $50,000 for companies located outside the State of Alabama and that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits and I find that at all times material herein, Alabama Carpenters Regional Council, Local 127 has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

The complaint alleges, Respondent admits and I find that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All production and construction employees; excluding office clerical employees, supervisors and guards as defined in the Act.

IV. BACKGROUND, FACTS AND ANALYSIS

Respondent's business was commenced by its President Eric McKenzie who initially worked from his home and hired employees locally on a casual basis by going to a location where individuals gathered and made themselves available for hire on a daily basis as casual employees. As Respondent's business grew it came to include three crews who were made up of a supervisor and approximately seven employees each, who performed concrete related construction work, primarily for residential subdivisions. Respondent also had a three-person crew who prepared the footings for the construction of the foundation walls by the other three crews. Respondent's crews who had been initially hired by the crew chiefs at the above location consisted primarily of Hispanic employees many of whom did not speak English. Eric McKenzie paid the employees by cash in the approximate amount of $10,000 per week, which McKenzie withdrew from his bank account and gave to each of the crew chiefs for distribution among the employees on their crews. Most of these employees including the crew chiefs were not on a payroll and no taxes or social security payments were deducted. At the hearing Respondent maintained that these were merely casual employees and were not covered by the National Labor Relations Act. However, Eric McKenzie also testified that in March or April, 2003, his accountant advised him that he should change his method of distribution of cash to these employees as his lack of record keeping could support the conclusion that the cash he withdrew was for his own use rather than being paid to the individuals who performed the construction work. Two groups of individuals contributed labor to the completion of these jobs. The first group (group I) was included on the formal payroll of Respondent and Respondent withheld taxes and other deductions for these employees. At all times during March 1, 2003 through July 1, 2003, the following four individuals were included in group I:

1. Marie Caton
2. Danny Dickerson
3. Jerry Matthews
4. Jerome Watkins

The remaining individuals were not on the formal payroll but were paid by the crew chiefs who distributed the cash they were given by Eric McKenzie, on a weekly basis. No records were kept of these employees for income or social security purposes or any other purposes. At one point in his testimony at the hearing Eric McKenzie testified he did not know the names of most of the crew members who performed the work for his projects.

In early 2003, the Union searched out the Respondent's operations, which were conducted throughout a number of residential subdivisions being constructed in the Birmingham, Alabama area. Union organizer Johnny Arguedas testified that he began formal organizing in April 2003. Arguedas is a native Spanish speaker and is fluent in both English and Spanish. Most of Arguedas' organizing efforts of Respondent's employees involved communicating in Spanish with members of the non-English speaking work force of the three crews that were on the Respondent's cash payroll. Arguedas regularly visited the crews' work locations at residential construction jobsites throughout the Birmingham area including the Rocky Ridge, Chestnut Ridge, Highland Lakes, Scout Creek, Lake Crest, Carrington Lakes, Chelsea and Liberty Park subdivisions. Between April and June 2003 he made approximately 35 jobsite visits. He visited Ernesto Del Valle's crew on approximately ten occasions. He visited Nicolas Ramirez' crew on approximately 15 to 20 or more occasions. He visited Antonio Ramirez' crew on approximately five occasions. He introduced himself and met with the crew leaders and the workers. Arguedas explained the Union's purposes to the employees and distributed union literature. He then solicited them to sign "Tarjeta de Autorizacion" or Authorization cards." Consistent with training he had received from the International Union he distributed the cards to the employees, read the language on the cards aloud in the employees' presence, asked the employees if they understood the cards or had any questions. He answered any questions and asked the employees to sign the cards. Consistent with instructions he had received from the Union Local's Director of Organizing, he wrote his initials and the date on the back of each card after observing the employees sign the cards and they returned them to him. He obtained executed "Tarjetas de Autorizacion" cards from eighteen (18) workers. Each of these eighteen workers was a resident of the Montevallo, Alabama community and Arguedas had personally ob-

served them working on the Respondent's jobsites with either Ernesto Del Valle, Nicolas Ramirez, or Antonio Ramirez.

Union representatives visited the home of Respondent's Owner Eric McKenzie on June 2nd, and requested him to recognize and bargain with the Union on behalf of the employees. Respondent declined to do so and has since that time failed and refused to recognize and/or to bargain with the Union. McKenzie testified that he heard one of the men mention the word "Union" and that he turned and walked away. He testified that until this occasion, he had no indication that the Union was attempting to organize his employees.

Arguedas testified that on June 3rd he met with some of the Respondent's workers in Montevallo, Alabama, including Luis Arguello, Dorte Guerrero, Pedro Conteras, Valente Martines, and Supervisors Nicolas Ramirez and Ernesto Del Valle. Arguedas testified that during that meeting Supervisor Nicolas Ramirez told him and the employees present that earlier that morning, Respondent's Owner Eric McKenzie had found "packages" of Union literature in the personal truck of Supervisor Antonio Ramirez and that McKenzie grabbed them and began searching the truck for further information. Arguedas also testified that during the meeting in Montevallo, Supervisor Ernesto Del Valle told the employees that earlier that day Respondent's Owner, Eric McKenzie, told him and Supervisor Antonio Ramirez that he did not want the Union and would give a $1-an-hour raise to employees who brought in proper paperwork to be placed on the noncash payroll.

The Union filed its Petition for an Election on June 4th in Case 10–RC–15381. On the same day Respondent placed its three crew chiefs, Ernesto Del Valle, Nicolas Ramirez, and Antonio Ramirez onto the formal payroll and also converted five nonsupervisory cash workers to the formal payroll.[22] Although Respondent had promised a $1-dollar-an-hour wage increase for conversion to the formal payroll, the Respondent did not grant the raise.

Arguedas further testified that on June 10th he met in Ernesto Del Valle's home in Montevallo, Alabama, with Ernesto Del Valle, Supervisors Antonio and Nicolas Ramirez, employee Jamie Gutierrez and other employees. Employees Cesar Moreno, Felipe RoDela, and Alfredo Del Valle lived in the same house with Ernesto Del Valle at that time. Arguedas testified that during the meeting Supervisor Ernesto Del Valle told him and the other employees who were present that owner McKenzie had called him into the office and asked him about the Union and told him that Supervisor Antonio Ramirez had said that Del Valle was behind the Union. Arguedas further testified that Del Valle then said that he had checked with Antonio Ramirez who told him that McKenzie had called him in and told him that Del Valle had said that Ramirez was behind the Union.

The parties executed and the Regional Director approved a Stipulated Election Agreement in Case 10–RC–15381 on June 12th, scheduling the election for June 24th, in the unit of "All production and construction employees, excluding office clerical employees, supervisors and guards as defined by the Act." On June 13th, Respondent's attorney transmitted a "Voter Eligibility" or "Excelsior" list to the Board's resident office in Birmingham. The resident office forwarded a copy of the list to the Union. Arguedas and another organizer reviewed the list and found names on the list, which they did not recognize and they decided to inquire regarding these workers' identities.

Approximately a week or two prior to the election Arguedas took a copy of the list to Supervisor Del Valle and told him that the name Jorge Hernandez appeared on the list but was unknown to him. Del Valle told him that "Jorge Hernandez" was the name Eduardo Morales Serrano had given the Respondent when Respondent had asked for the paperwork in return for the raise. Arguedas then wrote the name "Eduardo Morales" next to the name "Jorge Hernandez" on the list, Arguedas then asked about the entry "Severino Morals" on the list and Del Valle told him that this was the name that Mizael Del Valle had given the Respondent when it asked for paperwork. Arguedas wrote "Mizael Del Valle" next to the entry "Severino Morals." Arguedas next asked Supervisor Del Valle about the name "Cesar Moreno" on the list and Del Valle told him that this was the same person as "Cesar Moreno Morales" who had already been signed up by the Union. Arguedas next asked Del Valle about the entry "Venancia Morales Serrano" and Del Valle told him this was the name Alberto Morales Serrano had given the Respondent for the raise and Arguedas then wrote "Beto Morales" next to the entry "Venancia Morales Serrano" on the list. Arguedas asked about the entry "Omar Garcia Vela" on the list and Del Valle told him this was the entry for "Jesus" whom the Union had already signed up as "Jesus Omar Garcia Vela" and Arguedas then made an abbreviated entry of "Jesu Gar." He made all of these entries in Supervisor Del Valle's presence. Additionally at the hearing Arguedas identified Eduardo Morales, Alberto Morales, and Mizeal Del Valle from photographs taken during a cookout at Supervisor Del Valle's home during the organizing campaign. He identified them as the same employees he saw working regularly with Ernesto Del Valle and who had signed their authorization cards.

The Union made arrangements to transport the unit employees to the polls for the June 24th election. When Arugendas visited the jobsites he learned that several multiple concrete truck pours were scheduled for that afternoon. The Union picked up seven employees who were willing to come and transported them to the polls. Arguedas identified the seven voters who had signed cards as Mizeal Del Valle, Alberto Morales Serrano, Cesar Moreno Morales, Jesus Omar Garcia Vela, Pedro Contreras, Valente Martines, and Benjamin Romero.

The Board conducted the election. The tally of ballots showed that of approximately 9 eligible voters, 0 votes were cast for Union representation, 4 cast votes against Union representation, there were no void ballots and there were 7 determinative challenged ballots. The Union thereafter filed objections to conduct affecting the results of the election.

Following the election, the Regional Director sent a letter requesting evidence regarding the eligibility of those who had cast determinative ballots. The Respondent ran searches through an internet credit data base "People Find USA" regard-

[2] Antonio Ramirez was placed on the payroll as "Ramirez Aldo Quintana." Although the parties stipulated that Nicolas Ramirez was also converted to the payroll that date, he is not listed on the payroll.

ing the names and social security numbers of the four Hispanic formal payroll employees who had appeared at the polls. The Respondent then discharged these individuals on or about July 1st. The Respondent continued to employ a cash basis work force at that time and continued to employ Jose Hernandez who had not appeared at the polls to vote. It did not run searches of any of the other employees.

Benjamin Romero testified that after he voted in the election, Supervisor Antonio Ramirez told him and other crewmembers on four or five occasions that those who voted in the election would not have work with the company. He also testified that about 2 months after the election, Supervisor Antonio Ramirez told him that because of differences between the Company and the Union, the employees who had voted in the election would not be working for the Respondent anymore.

The Alleged 8(a)(1) allegations

The Truck Search

The complaint alleges that on about June 3rd, the Respondent by Eric McKenzie at a jobsite in the Birmingham, Alabama vicinity, in the presence of employees, searched areas of a personal vehicle where employees ordinarily keep their personal effects and confiscated materials related to the Union from the vehicle.

It is undisputed that on June 3rd Respondent's Owner Eric McKenzie searched the personal truck of supervisor Antonio Ramirez. Johnny Arguedas testified that he met with supervisor Nicolas Ramirez in the presence of several employees on the evening of June 3rd and that Supervisor Nicolas Ramirez, a Section 2(11) supervisor and a Section 2(13) agent of Respondent under the Act, told them that on that day McKenzie had found "packages" of the union literature which Arguedas had distributed, in the personal truck of Supervisor Antonio Ramirez and that McKenzie then opened the truck and started looking through it.

Supervisor Antonio Ramirez testified at the hearing that during the union campaign he owned a pink truck which he used for company business to transport tools and to drive from one jobsite to another and to transport Respondent's employees to their jobs from their homes. He also testified that Owner Eric McKenzie would check his truck on occasion to insure that the crew still had the equipment that McKenzie provided and to check if it lacked any materials required for the jobs. He also testified that on one occasion McKenzie found a union flyer in his truck.

Owner Eric McKenzie testified that during the union campaign, Supervisor Antonio Ramirez drove his (Ramirez's) personal truck to transfer tools and equipment among the jobsites. He acknowledged having looked at the contents of Supervisor Antonio Ramirez' personal truck which he testified was routine as he from time to time searched all of the trucks driven by the supervisors to insure that Respondent's tools and equipment were still in the trucks and that the trucks had sufficient materials necessary for the jobs required by Respondent.

Supervisor Ernesto Del Valle testified that during the union campaign, supervisor Antonio Ramirez drove his personal truck and carried company tools on it and that employees rode in the truck and that on occasion employees rode in the truck while Antonio Ramirez drove a company truck from one jobsite to another.

Analysis

I credit the specific account of Arguedas who testified concerning the statements made by Supervisor Nicolas Ramirez to Arguedas in the presence of Supervisor Del Valle and employees gathered at Del Valle's house on the evening of June 3rd. I find that Respondent's failure to call Nicholas Ramirez to testify concerning this matter warrants an inference that his testimony would have been adverse to the Respondent's position in this case. *International Automated Machines*, 285 NLRB 1122, 1123 (1987) enfd. 861 F.2d 720 (6th Cir. 1988). I find that Arguedas testimony as to what Supervisor Nicolas Ramirez had related to him and the gathered employees was an admission by Nicolas Ramirez that he had observed McKenzie grab the union literature in Antonio Ramirez's truck and search for additional information concerning the Union. I find that the account of Nicholas Ramirez as relayed by Arguedas directly points out what McKenzie did after he discovered the union literature in Antonio Ramirez's truck. Moreover the timing of the search of Antonio Ramirez' truck by McKenzie the morning following the Union's assertion of majority authorization card status and its demand for recognition suggests that the search of the truck by McKenzie was motivated by his being apprised of the union campaign the night before by the Union's assertion of majority status and its demand for recognition. I find that the relation of this incident by Supervisor Nicholas Ramirez to the gathered employees violated Section 8(a)(1) of the Act as this recounting of McKenzie's search for additional union literature in the truck was inherently coercive sufficient to draw Supervisor Nicholas Ramirez' attention and this conduct reasonably tended to interfere with the employees' free excise of their rights under the Act. *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999), citing *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995).

The Promise of a Raise

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by Supervisor Ernesto Del Valle's account by telling employees during a meeting at his home with certain of Respondent's employees on the evening of June 3rd that owner Eric McKenzie had told the supervisors that he did not want anything to do with the Union and that he would give a $1-dollar-an-hour raise to anyone of the employees who brought in documentation to convert from cash to the formal payroll. This statement was related to Arguedas and the employees gathered at the meeting by Supervisor Del Valle who was a Section 2(11) supervisor and a Section 2(13) agent of Respondent under the Act. All of the cash employees were employees who had been selected by Respondent and its supervisors to perform the work and who were paid on a cash basis. These were Spanish speaking Hispanic employees who generally spoke very little if any English.

Owner McKenzie testified that he told supervisors he would give a $1-dollar-per-hour raise to cash workers who brought in Social Security cards and converted to the formal payroll on the recommendation of his accountant in March or April 2003, in order that the large sums he withdrew weekly to give to his

supervisors to pay the employees would not be considered to be income for him personally rather than to the employees who were being paid for their work.

Supervisor Ernesto Del Valle testified that approximately 2 months prior to the Union's request for recognition, employees were being converted from cash to the formal payroll and that he (Del Valle) had asked McKenzie for a dollar-an-hour raise for employees who were generally paid eight-dollars-per-hour. He testified he did not tell Arguedas and the employees at the June 3rd evening meeting that McKenzie had offered the dollar-per-hour raise for employees who converted from cash to the formal payroll. He also testified that it took around 8 days for the conversion to become effective.

Analysis

I credit the testimony of Arguedas that Del Valle related the offer of a one-dollar-per-hour raise by McKenzie which was coupled with the prior statement of McKenzie that he did not want to have anything to do with the Union. I found Arguedas' testimony to be specific and accurate in detail as to what Del Valle said. Arguedas pinpointed the meeting at which Del Valle made these statements as the evening of June 3rd rather than the generalized testimony of McKenzie and Del Valle who could not recall the dates when the payroll changes went into effect.

I find that the Respondent did not take action to convert its cash employees to the formal payroll until it learned of the union campaign on June 2nd when the Union requested recognition. Despite the generalized testimony of Owner McKenzie to the effect that Respondent's accountant had advised him in March or April to convert their employees from a cash to a formal payroll status, there was no evidence that any employees were converted to the formal payroll system until the week following the June 3rd meeting of McKenzie with his supervisors. As the General Counsel argues in brief it is highly likely that the cash employees would have presented documentation the very next day after being told they would be given a one-dollar-per-hour raise if they brought in documentation showing their legal work status to be placed on the formal payroll. However, the parties stipulated at the hearing that no one was converted from cash to formal payroll until June 4th, 2 days after the demand for recognition.

The accounts of Del Valle and Arguedas are at odds as Arguedas testified that Del Valle relayed the promise by McKenzie of a raise at the June 3rd meeting, whereas Del Valle denied that there had been a promise of a raise made by McKenzie. Rather Del Valle testified that he told the employees at the June 3rd meeting that he had asked for a raise. However, consistent with Arguedas' account, McKenzie admitted at the hearing that he had promised a raise. It is undisputed that the raise was not given to the employees by Respondent. Furthermore, Respondent's failure to call its supervisor Nicholas Ramirez, who was present at the June 3rd meeting when Del Valle made these statements concerning the raise gives rise to an inference that Ramirez would have corroborated Arguedas' account rather than Del Valle's.

It is well settled that the promise or grant of benefits such as a raise made by an employer to dissuade employees from organizing violates Section 8(a)(1) of the Act. I find that Respondent did promise the supervisors that the employees would be given a raise and made this statement on the morning after McKenzie had received and refused the Union's request for recognition. Del Valle's statement as testified to by Arguedas was that McKenzie initially told the supervisors at the June 3rd morning meeting that he did not want to have anything to do with the Union and then followed this up by telling the supervisors he would grant the employees a $1-an-hour raise if they brought in documentation in order to be placed on the payroll. When Del Valle repeated these statements and the offer of a raise coupled with the statement of McKenzie that he did not want anything to do with the Union, the Respondent violated Section 8(a)(1) of the Act. *CBF, Inc.*, 314 NLRB 1064, 1071 (1994); *Wis-Pak Foods, Inc.*, 319 NLRB 933, 938 (1995) citing *Low Kit Mining Co.*, 309 NLRB 501, 507 (1992).

The June 10th Statements by Ernesto Del Valle

Johnny Arguedas testified that he met with supervisors Ernesto Del Valle, Nicolas Ramirez, Antonio Ramirez, and several nonsupervisory employees in Montevallo, Alabama on June 10th. He testified that at this meeting Del Valle told him that Owner Eric McKenzie had called him (Del Valle) in earlier that day and told him that Antonio Ramirez had told him that Del Valle was behind the Union. Arguedas testified that Supervisor Del Valle also told them that he discussed this with Antonio Ramirez who told him that McKenzie had also called him in and told him that Del Valle had told him that he (Antonio Ramirez) was behind the Union. Ernesto Del Valle who was called as a witness by Respondent acknowledged that he had met with Arguedas at his home on June 10th, but denied having told Arguedas that McKenzie had told him that Antonio Ramirez had said that he (Del Valle) was behind the Union. Respondent did not call Nicolas Ramirez to testify and did not inquire of Antonio Ramirez of the meeting of June 10th, although Arguedas' unrebutted testimony placed both Nicolas and Antonio Ramirez as present at the June 10th meeting. I find that the failure to call Nicolas Ramirez as a witness and to question Antonio Ramirez concerning this matter warrants an inference that they would have corroborated Arguedas' accounts.

Analysis

I credit the testimony of Arguedas concerning the statements made by Del Valle at the June 10th meeting. I find that McKenzie was attempting to obtain information concerning the Union from his supervisors. This did not violate the Act as supervisors are excluded from the protection of the Act. However, when Supervisor Del Valle told the employees present at the June 10th meeting of the aforesaid conduct of McKenzie regarding the interrogation and attempt to pit his supervisors against each other, this was violative of Section 8(a)(1) of the Act as it reasonably tended to create an impression among employees that their own identities and conduct in support of the Union was under surveillance as Respondent was seeking information concerning their union activities. *United Charter Services*, 306 NLRB 150 (1992).

The Discharges

The complaint alleges that Respondent discharged its employees Jesus Omar Garcia Vela, Cesar Moreno, Venancia Morales Serrano, and Severino Morals because of their engagement in union and protected activities in violation of Section 8(a)(3) of the Act and because of their participation in a Board representation proceeding in violation of Section 8(a)(4) of the Act. All aspects of participation in the Board's processes, including voting in a Board election, are protected by the Act. *Hyatt Regency Memphis*, 296 NLRB 259 fn. 4 (1989). *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) applies in cases where the employer's motivation is at issue. See *McKesson Drug Co.*, 337 NLRB 935, 936 (2002) applying *Wright Line* shifting burden test to 8(a)(4) allegations. Under *Wright Line*, the General Counsel has the initial burden to establish a prima facie case of improper motivation by establishing the following four elements:

(1) The alleged discriminatee engaged in union or protected concerted activities,
(2) Respondent knew about such activity;
(3) Respondent took adverse employment action against the alleged discriminatee; and
(4) There is a link or nexus between the protected activity and the adverse employment action, *Carrier Corp.*, 336 NLRB 1141, 1150 (2001).

Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence, that it took the adverse action for a legitimate nondiscriminatory business reason.

In the instant case the four alleged discriminates appeared at the polls to vote in the election and their ballots were challenged by Respondent upon advice of its attorney to test the application of the Supreme Court's decision in *Hoffman Plastic Compound, Inc. v. NLRB*, 533 U.S. 976 (2001). The employees' right to vote is protected under Section 8(a)(4) of the Act. The employees' arrival at the polls to vote and their previous signing of union authorization cards constituted protected and union activity. The Employer had knowledge that the employees were picked up by union representatives at several jobsites as witnessed by supervision. Respondent was also aware that these employees had appeared at the polls and were challenged. All four employees were discharged on or about July 1st, establishing the adverse action. Respondent's hostility toward the Union and its supporters is established by the Section 8(a)(1) violations found and by supervisor Antonio Ramirez' statements to employees after the election that those who voted in the election would lose their jobs. It was stipulated that the Respondent only ran identity checks for the four employees who voted in the elections as they were the only Hispanic payroll employees to appear at the polls to vote.

Respondent contends in brief as follows:

> Many of the individuals who performed work for CFW were Hispanic, as were some of the individuals who presented documentation and were added to the payroll. Others on the CFW payroll are not of Hispanic background. The immigration laws require an employer to check documentation such as Social Security card at the time of hire and not to hire anyone who cannot produce adequate documentation. The immigration laws (and the INS website and employer bulletins) instruct employers to be evenhanded in application of these rules. An employer is to require documentation from each applicant, whether or not the employer may feel that it has reason to suspect the applicant may be undocumented. Similarly, an employer is to accept at face value documents, which appear genuine and establish that the applicant is able to work in the United States. An employer should not, without more, make further inquiry about applicants that it may feel on racial or cultural grounds are more likely to have presented false documentation.
>
> All four of the individuals voted in the election on June 24, 2003. Prior to the election, CFW decided, as is clearly its right, to contend both that undocumented aliens are not employees within the meaning of the Act and that undocumented aliens do not have a community of interest with legal employees. The recent U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc., supra* supports its argument as to whether these individuals can be covered by the NLRA. The Board's decisions on community of interest suggest that undocumented aliens should be excluded from this bargaining unit. In order to preserve its legitimate arguments, CFW was forced to challenge the ballots of any possibly undocumented aliens. Of course, once a ballot is cast without challenge any argument as to that individual's eligibility to vote is forever waived.
>
> Even though these four individuals had presented documentation, which appeared to be valid, it is undisputed that they are aliens, and at that point CFW had made no inquiry into the validity of their documentation. Any individuals not on the eligibility list were to be challenged by the Board, so CFW did not take upon itself to challenge any of its casual employees who tried to cast ballots. CFW did not challenge the four individuals who voted because its president had personal knowledge that each of the four were born and raised in the United States, and thus were neither undocumented nor alien.
>
> After the election was held, CFW received a request from the Board's Regional Office to submit evidence in support of its position on its four challenges. CFW then took steps for the first time to determine whether the documentation (i.e., Social Security numbers) submitted by these four individuals was in fact genuine. Had CFW refused to respond to the Boards' request for evidence it would at some point have lost these challenges regardless of the correctness of its legal argument. The searches instigated by CFW demonstrated that all four of these individuals had presented false credentials in order to be placed on CFW's payroll. At that point, CFW was in possession of information, which demonstrated that these four individuals were undocumented aliens. A failure by CFW to immediately discharge all four would have subjected it to civil and criminal penalties under IRCA. CFW had no choice—it immediately terminated these four individuals.

General Counsel will contend that these individuals were unlawfully 'singled out' for further inquiry into their status, which somehow constitutes discrimination. It is true that CFW did not check the credentials of the four individuals who voted without challenge, and also did not check the credentials of other employees who did not vote. However, Eric McKenzie has testified without contradiction that the four voters who went unchallenged were known to him to be U.S. citizens by birth, so there was no need to either challenge them or check their documentations. With respect to individuals who did not vote, employers are generally instructed by the Immigration Service not to look behind apparently genuine documents presented at the time of application. Any employer who does so runs obvious risks under Title VII of the Civil Rights of Act of 1964 and otherwise for national origin discrimination.

This situation is different with respect to these four people. CFW had to challenge their votes to preserve its legal argument and had to obtain information on their immigration status to respond to the board's request for evidence and to determine whether its legal argument applied to any of these individuals. If CFW is found liable under § 8(a)((3) for its actions with respect to these four individuals, it will be punished for taking a legitimate legal position and then doing only what was absolutely necessary to preserve that position.

CFW also notes that the discharge of these individuals presents as clear a defense as can be imagined under *Wright Line*, 252 NLRB 1083 (1980). Of course *Wright Line* stands for the proposition that a discharge or other discriminatory act, which might be found illegal because of a finding of unlawful intent, is not a violation of Act if the employer can demonstrate that it would have taken the same action regardless of its intent. Here, CFW has demonstrated that it would have been a federal crime for it not to have discharged these individuals immediately upon receipt of knowledge of their status. *Wright Line* also mandates a finding that these discharges are not unlawful.

Conclusions

I find that Respondent has failed to prove that the four employees at issue in this case were illegal aliens or barred from employment in the United States. In the *Hoffman* case on which the Respondent relies, the Supreme Court reversed enforcement of a Board order awarding backpay to an undocumented worker whom the employer hired without knowledge of his immigration status. The Court held that the Immigration Reform and Control Act of 1986 (IRCA) developed a comprehensive scheme to combat the employment of undocumented workers in the United States. It held that IRCA foreclosed the Board from awarding backpay to an individual who was not legally authorized to work in the United States. It held that a backpay award "for a job obtained in the first instance by [the applicant's] criminal fraud . . . not only trivializes the immigration laws, it also condones and encourages future violations." *Hoffman* at 1283, 1284. It held that the discriminatee was unable to comply with Board law requiring him to mitigate damages by seeking lawful interim employment Id. At 1284. However, the Court noted that the Board retained "other significant sanctions" to deter these discharges, such as notice posting provisions and cease and desist orders, subject to contempt sanctions Id. At 1285. The Court reaffirmed its prior holding in *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 892 (1984) that undocumented aliens are employees under the National Labor Relations Act. In *County Window Cleaning Co.*, 328 NLRB 190 fn. 2 (1999) the Board overruled a challenge to an election ballot based on immigration status.

Respondent's *Wright Line* defense failed to demonstrate by a preponderance of the evidence that it would have discharged the four employees even in the absence of their union or concerted protected activities. It is undisputed that work was available. Respondent took no action to check the legality of the work status of its other Hispanic employees other than the four employees who appeared at the polls to vote. Its reliance on the *Hoffman v. NLRB* case is misplaced as it did not profess any concern about the legal status of its Hispanic employees other than these four employees. Moreover, Respondent has not proved by its resort to a credit locater on the Internet that these four employees did not have legal standing to work in the United States because of their purported alien status.

General Counsel contends in brief that Respondent ignored potential concerns of their employees' work eligibility status and singled out only those employees who engaged in protected activities. He notes that in this case Respondent staffed three crews with one supervisor and approximately seven workers per crew, all of them non-English speaking and all of them working "off the books." Owner McKenzie withdrew approximately $10,000 in cash each week, which he distributed, to the supervisors to pay the workers. McKenzie did not inquire concerning the workers' names, documentation, or require social security cards of them until the advent of the Union's request for recognition. General Counsel contends that Respondent was clearly indifferent to the lack of documentation to work in the United States of any of the employees or even the supervisors.

General Counsel contends that the search results supplied by "People Find USA" are not probative to show whether or not the employees had documentation to work in the United States. The failure of the credit search to match the social security card numbers presented by these workers to the Respondent in return for being placed on the Respondent's payroll with the promise of $1-per-hour raise, indicates noting more than the social security numbers do not belong to individuals who appear in the credit databases because they have not been securing loans.

I find in agreement with the General Counsel's position as set out above, that Respondent failed to carry its burden of establishing a *Wright Line* defense and the discharge of these employees violated Section 8(a)(1), (3) and (4) of the Act.

The Bargaining Allegations

The complaint alleges that Respondent has refused to recognize the Union and bargain with it in good faith. Respondent admits that it has not recognized the Union nor bargained with it on behalf of the unit employees and contends it has no obligation to do so. The Union and General Counsel seek a bar-

gaining order retroactive to June 2, 2003, when the Union had attained bargaining status and made a demand for recognition on Respondent's Owner, Eric McKenzie in reliance on the single purpose authorization cards and Respondent's unfair labor practices which are alleged in the complaint to have been so outrageous and pervasive as to preclude the holding of a fair rerun election. Eighteen authorization cards out of a bargaining unit of 25 solicited by union organizer Johnny Arguedas were received in evidence. Arguedas testified that he personally solicited the cards. Employee Benjamin Romero authenticated his own card. *Don the Beachcomer*, 163 NLRB 275 fn. 2 (1967). These cards clearly establish that the Union had a majority of cards signed when it made its June 2nd demand for recognition and bargaining. As set out above the unit description is stipulated as "all construction and production employees, excluding office clerical employees, supervisors and guards as defined by the Act." Respondent utilized two payrolls during the period of the request for recognition and immediately thereafter. Group I consisted of employees who were at some point on Respondent's formal payroll. Group II employees were paid in cash. Group I was made up of four employees. Marie Caton, Danny Dickerson, Jerry Matthews, and Jerome Watkins were included in the unit. Respondent contends that the individuals who joined group I as formal payroll employees (the four discriminatees in this case) on June 4th did not have proper documentation and were not "employees" within the meaning of the Act and did not have a community of interest with the other employees. However, the group II employees (who were paid in cash) had regular and recurrent employment with the Respondent. Benjamin Romero worked more than a year as a group II cash employee on an average of 5 to 6 days a week plus additional days in some weeks.

Arguedas testified that he made over 35 jobsite visits over several months and with a few exceptions observed the same 25 employees working in the same crews under the same supervisor from April through June 2003. Nine of these employees were in group I (formal payroll) and sixteen other employees were not in group I. Thus the group II individuals were regularly employed by Respondent. The testimony of Arguedas was not disputed nor rebutted at the hearing. The employees on the group II cash payroll worked under the same supervisors as group I employees and all employees were under the overall direction of Owner McKenzie. The common supervision is demonstrative of the community of interest between the group I and group II employees. It was stipulated that in each crew the employees performed the same work, used the same tools and rode together in vehicles and had common working conditions.

The following are single purpose authorization cards clearly authorizing the Union to act as the signer's bargaining representative. These cards were self-validating and have been authenticated.

> Autorizo a _____ de la Hermandad de Carpinteros y Ensambladores de America (la Unión) a representarme en convenios colectivos con cualquier patron para quien trabajare dentro de la jurisdicción de la Unión. Entiendo que esta tarjeta puede ser utilizada para obtener el reconocimiento de me actual o futuro empleador con sin una elección. Esta autorización quedara en efecto hasta tanto someta una revocación por escrito.
>
> I authorize _____ of the United Brotherhood of Carpenters and Joiners of America ("the Union") to represent me in collective bargaining with any employer for who I may work within the jurisdiction of the Union. I understand that this card may be used to obtain recognition from my current or future employer with or without an election. This authorization shall remain in effect until such time as I submit a written revocation.

There was no evidence of any misrepresentation by Arguedas made to any unit employee, which would invalidate the cards. Rather the testimony of Moreno was supportive of the testimony of Arguedas concerning what he was told by Arguedas. *Amalgamated Clothing Workers v. NLRB*, 419 F.2d at 1209. There was no evidence of supervisory taint of the cards as there was no evidence of coercion or implied employer favoring of the Union. It is undisputed that each of the cards was signed in the presence of Arguedas who witnessed the signature and the cards authenticity and signature have been validated. The Union as of June 2nd had a clear majority of 18 cards in a 25-employee unit.

In *NLRB v. Gissel Packing Co.*, 395 U.S. at 613–618, the Supreme Court set out two categories of cases in which a bargaining order may be warranted. Category I cases are exceptional cases which involve outrageous and pervasive unfair labor practices that traditional remedies will not suffice to erase the coercive effects of the unfair labor practices and preclude a fair and reliable election. Category II cases are "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." Id at 614–615. In Category II cases a bargaining order is warranted because "the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

I find that this is a Category I case in which the unlawful conduct of discharging the four discriminates because they voted in the NLRB election constitutes "hallmark" violations of Section 8(a)(1), (3) and (4) of the Act and precludes the likelihood of a fair and reliable election if it were to be rerun as this conduct by the highest member of Respondent's management, Owner McKenzie went to the heart of the employment relationship and involved not only discrimination for engaging in union and concerted activities, but also involved interference with Board process by thwarting the employees' right to vote in an NLRB conducted election. Further, the threats and discriminatory discharge of Benjamin Romeo after the election demonstrates that Respondent's outrageous and pervasive unfair labor practices are continuing, thus demonstrating the likelihood that Respondent will continue in its illegal conduct designed to frustrate the purposes of the Act. In the event that the Board does not decide that a Category I bargaining order is warranted, I recommend a Category II bargaining order.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by searching the truck of Antonio Ramirez for union organizing materials.

4. The Respondent violated Section 8(a)(1) of the Act by creating among its employees the impression that it was engaging in surveillance to determine their union activities.

5. Respondent violated Section 8(a)(1) of the Act by promising pay raises to employees, in order to discourage employees from engaging in union activities.

6. Respondent violated Sections 8(a)(1), (3), and (4) of the Act by discharging its employees Omar Garcia Vela, Cesar Moreno, Severino Morales, and Venancia Morales Serrano because of their engagement in union and protected concerted activities in violation of Section 8(a)(1) and (3) of the Act and violated Section 8(a)(1) and (4) of the Act because of their participation in Board process by voting in the election.

7. Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union regarding the appropriate bargaining unit of "All construction and production employees, but excluding office clerical employees, supervisors and guards as defined by the Act."

8. The above unfair labor practices in conjunction with the status of Respondent as an employer within the meaning of the Act affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Election

On December 16, 2003, the Regional Director of Region 10 of the National Labor Relations Board issued his Report on Challenged Ballots, and Petitioners' Objections, Order Directing Hearing, Order Consolidating Cases, and Order Transferring Cases to the Board.

Pursuant to a Stipulated Election Agreement approved by the Regional Director of Region 10 of the National Labor Relations Board on June 12, 2003, an election by secret ballot was conducted on June 24, 2003, among the employees in the appropriate unit of "All production and construction employees, excluding office clerical employees, supervisors and guards as defined by the Act" to determine a question concerning representation raised by a petition filed by the Petitioner United Brotherhood of Carpenters and Joiners of America, Local 127 on June 4, 2003.

Upon conclusion of the balloting, a tally of ballots showed that of approximately 9 eligible voters, 0 cast ballots for and 4 cast valid votes against the Petitioner. In addition there were 7 challenged ballots. The challenged ballots are sufficient in number to affect the results of the election. On June 30, 2003, the Petitioner filed timely objections of conduct affecting the results of the election. After investigation of the challenges, the Regional Director concluded that the challenges to the ballots of Severino Morales, Cesar Moreno, Venancia Morales Serrano, Jesus Garcia, Pedro Contreras, Valente Martinez, and Benjamin Romero and Petitioner's Objections 2, 3, 7 and 8 should be consolidated with Case 10–CA–34483 for hearing before an Administrative Law Judge and issued the Report on Challenged ballots, Petitioner's Objections, Order Directing Hearing, Order Consolidating Cases, and order transferring cases to the Board.

I find the challenges to the ballots of Severino Morales, Cesar Moreno, Venancia Morales Serrano, and Jesus Garcia should be dismissed as the Employer has failed to establish that they are not eligible to vote. Rather the record testimony of Johnny Arguedas in this case establishes that these individuals were employed and performed the same work as other employees in the bargaining unit and thus have a community of interest with the unit employees. Individuals employed by an employer during the eligibility period and the date of the election are entitled to vote as their immigration status is irrelevant to the employees' eligibility to vote. *County Window Cleaning Co.*, 328 NLRB 190 fn. 2 (1999) See also *Superior Truss & Panel, Inc.*, 334 NLRB 916, 918 (2001). In *Hoffman Plastics Compounds, Inc. v. NLRB*, 335 U.S. 137 (2002), the Supreme Court affirmed the principle that undocumented aliens are employees under the Act within the definition of "employee" and are entitled to vote in Board elections.

I find the challenges to the ballots of Pedro Contreras, Valente Martinez, and Benjamin Moveno should be dismissed as the testimony of Johnny Arguedas established that they were employees in the unit on the day of the election when they appeared to vote.

In addition the Petitioner Union filed objections to the election. The critical period in this case is the period of time from the date of the filing of the petition on June 4, 2003 through the election on June 24, 2003. The Petitioner Union filed eight objections to the election. Pursuant to the Regional Director's Report on Objections, only objections 2, 3, 7 and 8 were consolidated with the unfair labor practice cases for hearing and referred to the undersigned.

In Objection 2 Petitioner contends that during the critical period prior to the election the Employer promised to and, in fact, subsequently did place employees on its noncash payroll and gave them $1-per-hour pay increases in order to induce them not to support the Petitioner. The record in this case shows that the raise had not been received by the employees as of the time of the hearing in this case.

I find that Objection 2 should be sustained as I found that pursuant to Respondent's promise of a raise to the employees on June 3rd which was coupled with the prior statement by owner McKenzie that he did not want to have anything to do with the Union as related to the employees by Supervisor Ernesto Del Valle on June 3rd, the Respondent violated Section 8(a)(1) of the Act. Although the June 3rd date is prior to the critical period from June 4th to the date of the election on June 24th, it was on June 4th (which was during the critical period) that the employer actually placed the employees on its formal payroll.

In Objection 3 Petitioner contends that during the critical period, the Employer created the impression that employees' protected activities were under surveillance. I find that this objection should be sustained in view of my finding that on June 10, 2003 supervisor Ernesto Del Valle related to employees at a

meeting on that date the conduct of Owner Eric McKenzie regarding McKenzie's interrogation of Del Valle and his attempt to pit his supervisors against each other to obtain information concerning the Union from his supervisor, thus creating an impression among employees that their own identities and conduct in support of the Union were under surveillance as Respondent was seeking information concerning their union activities.

In Objections 7 and 8 Petitioner contends that on the date of the election June 24, 2003, the Employer scheduled and assigned employees in such a manner as to impede employees from voting in the election and refused to release them from work in an attempt to prevent them from voting in the election. The Employer denies engaging in any objectionable conduct.

I find the evidence presented at the hearing is insufficient to sustain these objections. There was testimony that there were multiple concrete pours scheduled by the Employer for that date, Owner McKenzie testified that the Employer has to accept the concrete whenever it is available. His testimony in this regard was unrebutted. Moreover there was evidence that after being contacted by the General Counsel concerning the likelihood that employees would not be able to vote as scheduled, Respondent's counsel issued a "release letter" authorizing employees to leave their work to vote without threat of reprisals for doing so.

In summary, I recommend that the challenges to the ballots of Severino Morales, Cesar Moreno, Venancia Morales, Jesus Garcia, Pedro Contreras, Valente Martinez, and Benjamin Romero should be dismissed and their votes should be counted and certified. I also find that Objections 2 and 3 should be sustained and Objections 7 and 8 should be overruled.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act including the posting of the Board notice attached to the decision.

I shall recommend that Respondent be ordered to rescind the unlawful discharges of Cesar Moreno, Jesus Omar Garcia Vela, Venancia Morales Serrano, and Severino Morales, and reinstate them to their former positions or to substantially equivalent positions if the former positions no longer exist and make them whole for any loss of earnings and benefits they may have suffered by reason of Respondent's unlawful discharges of them.

All loss of earnings and benefits shall be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed under *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further recommended that Respondent be ordered to remove from its records all references to the discharges of Cesar Moreno, Jesus Omar Garcia Vela, Venancia Morales Serrano, and Severino Morales, and to notify each of the employees that this has been done and that evidence of such discharges will not be used against them.

I find the Respondent's numerous unfair labor practices warrant a broad cease and desist order. In view of the employment of a number of employees who do not understand or speak English, I recommend that the notice be posted in both English and Spanish. I also recommend there be a public reading of the notice by a responsible management official or by a Board agent in the presence of a management official.

It is recommended that challenged ballots be opened and counted and that a Certification of Representative issue if the revised Tally of Ballots demonstrates that a majority of the ballots were cast in favor of representation by the Union, but otherwise that the election be set aside.

It is further recommended that upon request by the Union the Respondent shall within 10 days of said request commence bargaining in good faith with the Union on behalf of the unit employees for a reasonable time and if an understanding is reached, embody the understanding in a signed agreement. *Raven Government Services*, 331 NLRB 651 (2000); *Nickolas County Health Care Center*, 331 NLRB 970 (2000).

On these finding of fact and conclusions of law and on the entire record, I issue the following recommended[3]:

ORDER

The Respondent, Concrete Form Walls, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Searching personal vehicles in which employees customarily ride for materials related to union organizing campaigns.

(b) Creating among employees the impression that it is engaging in surveillance to determine their union activities.

(c) Promising pay raises to employees, in order to discourage employees from engaging in union activities.

(d) Discharging employees because of their union activities, participation in elections conducted by the National Labor Relations Board concerning union representation, or other concerted protected activities.

(e) Refusing to recognize and bargain with Alabama Carpenters Regional Council, Local 127 regarding the appropriate bargaining unit of "All construction and production employees, but excluding office clerical employees, supervisors and guards as defined by the Act."

(f) Respondent shall not in any other manner interfere with, restrain or coerce its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer full reinstatement to Omar Garcia Vela, Cesar Moreno, Severino Morales, and Venancia Morales Serrano to their former jobs or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the aforesaid employees whole for any loss of earnings and other benefits with interest suffered as a result of

[3] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the discrimination against them in the manner set forth in "The Remedy" section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of employees Omar Garcia Vela, Cesar Moreno, Severino Morales, and Venancia Morales Serrano, and within 3 days notify the employees in writing that this has been done and that these unlawful actions will not be used against them in any way.

(d) Immediately recognize the Union as the collective bargaining representative of the unit employees, retroactively to June 2, 2003, and upon request within 10 days of said request for bargaining by the Union commence bargaining in good faith with the Union on behalf of the unit employees for a reasonable time and if an understanding is reached, embody the understanding in a signed agreement.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix[4]." Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall be posted in both English and Spanish and shall be read in the presence of all unit employees by a responsible management official or by a Board agent in the presence of a management official and shall also be read in Spanish by an interpreter. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 2003.

(g) It is further ordered that the Regional Director for Region 10 shall within 14 days from the date of this Decision and Order, open and count the ballots of Severino Morales, Cesar Moreno, Venancia Morales, Jesus Garcia, Pedro Contreras, Valente Martinez and Benjamin Moreno. If the revised Tally of ballots demonstrates that a majority of the ballots were cast in favor of representation by the Union, the Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification. Otherwise the election shall be set aside.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 8, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT engage in conduct that makes it appear that we are spying to discover employees' activities on behalf of the Alabama Carpenters Regional Council, Local 127.

WE WILL NOT promise raises or other benefits in order to encourage you to abandon support for the Union.

WE WILL NOT search privately owned vehicles or other places where employees keep personal effects for materials and fliers related to the Union.

WE WILL NOT discharge employees for supporting the Union or for voting in an election conducted by the National Labor Relations Board.

WE WILL NOT refuse to recognize and bargain with Alabama Carpenters Regional Council, Local 127 as the exclusive collective bargaining representative for the following group of our employees:

All production and construction employees; excluding office clerical employees, supervisors and guards as defined by the Act.

WE WILL not in any manner interfere with, restrain, or coerce you in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL recognize and bargain collectively in good faith with the Alabama Carpenters Regional Council, Local 127 as the exclusive representative of employees in the unit described above and, if an understanding is reached, embody that understanding in a signed contract.

WE WILL offer Omar Garcia Vela, Cesar Moreno, Severino Morales, and Venancia Morales Serrano full and immediate reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions without prejudice to seniority or other rights or privileges.

WE WILL make whole Omar Garcia Vela, Cesar Moreno, Severino Morales, and Venancia Morales Serrano, for any loss

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of earnings or benefits they may have sustained as a result of our unlawful discharge of them, with interest.

WE WILL, remove from our files all references to the unlawful discharges of Omar Garcia Vela, Cesar Moreno, Severino Morales, and Venancia Morales Serrano and we will inform them in writing that we have done so and that the discharges will not be used against them in any way.

CONCRETE FORM WALLS, INC.